No. 14188

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

REPLY BRIEF OF APPELLANT McKENNEY LOGGING CORPORATION

Appeals from the United States District Court for the District of Oregon.

S. J. BISCHOFF,
LEO LEVENSON,
Attorneys for Appellant McKenney Logging Corporation.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-54

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PRELIMINARY STATEMENT

Appellee argues every phase of this case on the hypothesis that it was the actual or beneficial owner of

the property with all incidents of ownership, including possession. No attempt is made to predicate any rights on the basis that it was a mortgagee *out of possession* whose debt has been paid in full and whose only surviving right under the contract, if any there be, was an option to purchase "logs" (personal property) at market price.

I.

Re: Appellee's Point I. Alleged Interference With And Inducement to Breach Contract By McKenney Logging Corporation.

Appellee does not seriously question the legal principles enunciated and applied in the authorities cited by Appellants that mere knowledge of the contract does not constitute inducement to breach the contract. Appellee contends (Br. 13):

> "appellant corporation, not only knew of the existence of the Buffelen contract, but *schemed with Mr. Errion and the partners* to commit a fraud on Buffelen *by agreeing to misstate the facts* in an effort to destroy Buffelen's rights in the timber. . . ."

There is *no finding of fact* that the Corporation, or Buol or Carr, "schemed" to defraud Buffelen, or that they "conspired" to do so, or "coerced", or "induced" McKenney and Glaser to breach the contract. The only finding of fact is that the

> "Corporation had knowledge of the contract". (Finding XI, Tr. 88).

The testimony of Matott and McKenney does not establish such an agreement or any coercion or induce-

ment on the part of the Corporation. It merely demonstrates that Errion and Matott (Agents of McKenney and Glaser) in their eagerness to consummate a sale and earn commissions, attempted to demonstrate that the Buffelen contract was not an obstacle to the transaction because it had been breached in a number of respects by Bueffelen and that in any event, the indebtedness had been paid in full.

To that end, *Errion and Matott* made a critical examination of the contract, listed the respects in which it had been breached, and they arranged a meeting at Mr. Prendergast's office (attorney for McKenney and Glaser, not for the Corporation or Buol and Carr), *to have him confirm their conclusions.* It was at this meeting that the agreement to "mistate facts" was supposedly made. (Matott, Tr. 415). (McKenney, Tr. 439).

The meeting was suggested by Errion (Tr. 410). This activity was not originated, suggested, or carried on by Carr or Buol. They did not urge or seek ways of abrogating the Buffelen contract or urge or induce McKenney and Glaser to do so.

This activity cannot, by any stretch of the imagination, be tortured into inducement by Carr and Buol to coerce McKenney and Glaser to sell them the property. No one testified that Buol was present at either meeting and he was not even mentioned as a prospective purchaser (Tr. 431). It is only claimed that Carr was present. He denies being present. Prendergast was not his attorney at that time. The first time he was in Prendergast's office was in October after this action was commenced (Tr. 486).

Referring to the interview at Mr. Prendergast's office, Matott testified (Tr. 396):

> "Well, there seemed to be two questions there. One was whether or not the contract had been broken, and the other was how the sale was to be handled in order to get around the contract. *And it was decided there that the buyer was to be ignorant of the contract.*
>
> Q. What advice or opinion, if any, did Mr. Prendergast give at that conference with respect to the Buffelen contract?
>
> A. He advised that the buyer should be held in that position of an innocent purchaser."

Matott did not include McKenney as among those present (Tr. 396), and McKenney had no recollection of Matott being at that meeting (Tr. 439-441). Yet both testified Carr was present. At the time it was not even known that Carr would be a party to the transaction (Tr. 405, 409, 434).

Buol was not even mentioned at the meeting (Tr. 416, 417-431) and obviously could not have agreed to anything.

The phrase, used by Matott,

> "And it was decided there that the buyer was to be ignorant of the contract", (Tr. 396)

was obviously the conclusion of the witness. He did not testify to what was said by anyone present from which the conclusion can be drawn. McKenney, who claims he was present, did not testify that such an agreement was made. *Neither of them testified that Carr did or said anything that can be construed as an assent to such an agreement,* and Carr denies he was present.

The answer is equivocal. It is susceptible of two constructions. *One* is that Mr. Prendergast, a reputable attorney, had given dishonest advice that Carr (who was not his client) should assume and maintain the position of an innocent purchaser; and the *second* is, that he advised objectively that only an innocent purchaser would not be bound by the contract. Between these two equivocal interpretations of the conclusory answer, the latter must be adopted for it cannot be assumed that Mr. Prendergast deliberately advised the commission of a fraud by Carr, especially when he was not at the time his client and was not at the time a prospective purchaser.

Neither Matott nor McKenney attributed to Carr any statement or act on his part which would constitute acquiescence, coercion or interference.

Matott's own testimony demonstrates that it was not "decided" that the buyer was to be ignorent of the contract for he later testified, and McKenney likewise, that

> "McKenney insisted that the buyer, Mr. Buol, be fully aware of the Buffelen contract." (Tr. 427).

Exhibit 21, Memorandum of August 14th meeting, made by Matott and McKenney, does not purport to be a memorandum of an agreement on the part of Buol. (Carr is not mentioned.) It is merely a memorandum of instructions from McKenney to his Agents, Errion and Matott, as to the terms to be submitted to Buol (not Carr) for acceptance. It begins as follows:

> "You are hereby instructed and authorized to proceed as per our oral agreement . . ."

There is no evidence of any affirmative act on the part of Buol or Carr of any agreement by them or of inducement, coercion, or participation in any conspiracy or scheme to interfere with or breach the Buffelen contract.

The testimony of Matott and McKenney is merely to the effect that Carr or Buol were aware of the contract and no more and this, under the principles set forth in Section 766 of the Restatement of the Law of Torts, is not inducement or coercion of McKenney and Glaser to breach the contract.

Re: Cases Cited by Appellee.

The cases cited by Appellee do not support the proposition that mere knowledge of the existence of a contract between A and B would constitute interference with and inducement to breach the contract. In the cases cited, the third party was merely the alter-ego of the party to the contract, created by him for the very purpose of enabling him to breach the contract.

The case of *Motely, Green & Co. v. Detroit Steel & Spring Co.,* 161 Fed. 389, cited by Appellee, is that sort of a case. The District Judge rendered a decision on a demurrer to the complaint, which assumed the allegations to be true. The complaint alleged that the plaintiff entered into a contract with the Detroit Company by which it was made its sole sales agent. In order to destroy that contract, Detroit Steel organized a corporation (Railway Steel) having substantially the same officers to be "the Sales Agent for Detroit". The Court

held the two corporations were "in fact, one" and that this was a

> "device and conspiracy between the two companies to break the contract . . ."

The Railway Corporation was the alter-ego of the Detroit Corporation. Upon these facts, both corporations were held liable.

There is no such relationship between the Logging Company and the Corporation. Here, we have an arms-length outright purchase and sale of property.

The case of *Mahoney v. Roberts,* cited by Appellee (p. 16), a retiring partner contracted not to re-enter the same business in the area. For the express purpose of avoiding this covenant, the retiring partner formed a sham partnership with his wife and a minor stepson to do business in the name of the stepson and he carried on the business in the area in violation of that covenant. They were all held liable because they actively participated in this fraudulent scheme which was devised for the express purpose of enabling the retiring partner to violate his contract.

These cases are typical of all of the cases cited by Appellee in this connection.

No case is cited which takes issues with the rule crystalized in Section 766 of the Restatement of Law of Torts (cited, p. 8, Opening Brief).

The *Phez* case, 103 Or. 514, did not involve the liability in *tort* of a third party for interfering with or inducing a breach of contract. The two parties defendant

were the "Growers", the principal, and the "Fruit Union", their Agents. Liability was imposed on the Growers as principals for *breach of contract* and not for the tort of inducing a breach by someone else.

The *DeMarais* case, 152 Or. 362, is a typical case of actual "coercion". The defendants, members of a State Board, forced an employer to discharge the plaintiff-employee by unlawfully refusing to issue a license required by law to the employer unless he discharged the plaintiff. The Court, in imposing liability, pointed out the distinction between "mere persuasion" and "coercion". The coercion must be

> "such as to preclude the employer's exercise of his free volition. It is not sufficient to offer him a choice; he must be *so constrained that he does not feel free to exercise an independent judgment.*"

This is the kind of interference, inducement, or coercion which is contemplated in the law of torts, imposing a liability for inducing a breach of a contract.

II.

Re: Appellee's Point II

Under Point II, Appellant Corporation contends that Appellee is not entitled to recover damages for trespass because it was not the beneficial owner or in possession of the timber lands and the timber removed therefrom, was not its property. This was predicated upon the ground that Appellee was merely a mortgagee out of possession; that its debt had been paid; that it merely

held the naked legal title in trust for the beneficial owner, to-wit, the Logging Company or its transferee, the McKenney Logging Corporation who were in possession, and that the only surviving right that Appellee had at the time of the alleged trespass, was the bare "option" to purchase "logs" at market price, which it might never exercise.

The partners, and later the Corporation, were not mere licensees as contended by Appellee. They were in possession as owners, cutting their own timber. After the debt was paid, they were the exclusive owners with all the beneficial interest and rights inherent in ownership and possession. The fact that the naked legal title was still in Appellee, coud not, and did not, change these legal consequences.

Appellee argues (Br. p. 21) that there was no promise to pay prior to or in the absence of cutting, that the contract did not provide that the partners should assume the fire risk and that it contemplated a sale of personal property, "i.e., logs." This is a distortion of the contract. The contract does not require the Logging Company to pay for any "stumpage" or for "logs". *All of the provisions in the contract for payments to be made by the Loggers were to be in re-payment of the loans or "advances" made by Appellee to the Loggers and not as the purchase price of "stumpage" or "logs".*

The rates per thousand board feet at which payments were to be made, merely measured the amount of the installment payments in satisfaction of the loans and not payment as the purchase price of either stumpage, logs, or real property.

Contrary to the assertion of Appellee, the contract specifically creates an obligation on the part of the Logging Company to pay the loans in full *regardless of the amounts realized from the logging operations.* It provides (p. 131):

> "In the event however, when the timber of the Lumber Company is all logged, the Logger shall pay to the Lumber Company (Appellee) any additional amount required to reimburse it for the total cost of its holdings as herein defined and in the event the Logger has paid more than the actual cost, then the Lumber Company shall refund such overpayments to the Loggers."

The assertion that the Logging Company was not to assume the fire risk is also contradicted by the contract and by the evidence. The contract provides (p. 130) for the repayment of all the advances with interest

> "and any and all taxes and carrying charges *and expenses* incurred by the Lumber Company in connection with the purchase of such timber."

Fire protection of the timber is, of course, an expense incident to the transaction and the evidence establishes that the Logging Company paid for the fire protection. McKenney testified (Tr. 285), that the Logging Company paid for the fire protection and the taxes and he produced the cancelled checks and receipts therefore. There is no testimony to the contrary.

Appellee's statement (p. 21)

> "It contemplated a sale of personal property, i.e., logs, to the partners"

is indefensible. There is not a word or syllable in the contract which can be construed as an agreement on the

part of Appellee to sell, and the Logging Company to purchase "logs". The contract is the very opposite. *The Logging Company was to sell logs to Appellee when it exercised the option to purchase logs.*

It is argued by Appellee (p. 21) that cutting contracts are personal and non-assignable; that this contract was non-assignable by its terms and, therefore, the Corporation acquired no rights under the contract.

In the first place, it is immaterial whether the Corporation acquired any rights under the contract for the *purpose of determining whether Appellee can maintain trespass.* It could only maintain trespass on the strength of its own possession and ownership for trespass is an invasion of the right of possession. It cannot succeed on the weakness of the defendants' right of possession or title. If the transfer was inoperative for any reason, the ownership and right of possession remained in the Corporation's transferor, the Logging Company. It did not vest ownership or possession in the Plaintiff to support an action in trespass.

The clause prohibiting transfer of the property without consent became inoperative when the indebtedness was paid off. Appellee ceased to be a mortgagee at that time. It no longer had any interest in the real property as such. The Logging Company was at liberty to sell and convey its beneficial interest as owner of the real properties. The Corporation acquired such beneficial ownership and with it, the actual possession.

Since Appellee only had, at that time, an option to purchase logs, there was nothing to prevent a convey-

ance of the properties to the Corporation. The most that Appellee could rightfully contend for under these conditions, is that the Corporation acquired the ownership of the lands subject to that option and if the option survived the payment of the loans, Appellee might have a cause of action for damages for breach of the option agreement. *But it had no cause of action in tort for trespass* for it had neither ownership nor possession.

Re: Possession.

Appellee now claims that it was in possession (Br. 24).

There is no finding of fact that Appellee was in possession of the timber lands at the time of the alleged trespass or at any time.

In the absence of a finding of fact that Plaintiff was in possession, a judgment in an action for trespass cannot be sustained for possession is the very gist of the action.

Appellee's claim of possession is based on testimony that the Buffelen Company had an employee present where the logging operations were carried on. But he was there merely for the purpose of selecting logs to be purchased (Tr. 289-290 and 230). This employee was not there to take and hold possession of real property or to exercise any dominion or control over it.

Constructive possession may be sufficient to enable a plaintiff to maintain trespass when dealing with *vacant and unoccupied lands as against a stranger who neither*

has or claims any interest in the land or possession thereof, but never as against the beneficial owner who is in possession.

The case of *Boyer v. Anduiza,* 90 Or. 163, cited by Appellee, contains no intimation that a plaintiff can maintain trespass on constructive possession *as against true owner in actual possession.* Defendant was a total stranger who "claimed no interest in the land or the grass thereon."

In 63 C.J., 905, Section 22, Title "Trespass", the text says:

> "Constructive possession is that possession which the law presumes the owner has, *in the absence of evidence of exclusive possession in another. If defendant is in actual possession, constructive possession in plaintiff is excluded."* (Emphasis supplied.)

In *David v. State,* 89 Atl. 214, the Court held:

> "Trespass is an injury to the possession of property, and therefore one who complains of such an injury *must show himself to have been in possession at the time the trespass was committed."* (Emphasis supplied.)

In *Pueblo & A. V. R. Co. v. Beshoas,* 5 Pac. 639 (Col.), plaintiff, in a trespass action, held legal title as security. The grantor (equitable mortgagor) was in possession. There had been no foreclosure and sale. The Colorado Statute (Section 263, Dawson's Code) provided:

> " 'A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without foreclosure and sale . . .'

The Court held that that statute deprived

> "A mortgagee of all right of possession, either before or after condition broken"

and that

> "Before a right of possession springs into existence, the mortgagee must foreclose his mortgage and sell the realty mortgaged. Having no title to the premises, and *not being in any way authorized to possess or occupy* the same, *plaintiff could not recover for damages thereto.* The judgment will be reversed, and the cause remanded."

The Oregon Statute (Sec. 86.010 ORS) is substantially the same as Colorado and the construction thereon is the same.

Jones on Mortgages, 8th Ed., Sec. 849, p. 166, says:

> "But in States where a mortgage is a lien only, a mortgagee not in possession and not entitled to possession, *cannot maintain an action of damages for trespass.*"

In *Investors Syndicate v. Smith,* 105 F. 2d 611, this Court construed the *Oregon Statutes.* After an exhaustive review of authorities, this Court held that a mortgagee has only a lien and is not entitled to possession until foreclosure and sale.

In Oregon, the same principle is applicable to cases where a deed is given to secure an indebtedness. *Caro v. Wollenberg,* 68 Or. 420.

In this connection, the distinction should be kept in mind between "stumpage" and "logs". Appellee uses these terms indiscriminately.

"Stumpage" is "*standing timber* in the *tree*" on the land, and is real property.

Ciapusci v. Clark, 106 Pac. 436;
Ray v. Schmidt, 66 S.E. 1035;
Nitz v. Bolton, 39 N.W. 15;
Gordon v. Grand Rapids, 61 N.W. 549.

"Logs" are personal property. They come into being only after the timber is severed and cut up into required lengths ready for removal.

III.

Re: Appellee's Point III.

Appellants' contention is that it is not liable for the $118,000.00 alleged loss of profits because it was under no contractual obligation to supply the Batterson Mill with logs, is supported by the case of *Mound Valley V. B. & Co. v. Mound Valley N. G. & D. Co.,* 258 Fed. 936, cited by Appellee (p. 31). The Court held in that case that the assignee of the contract was not liable for failure to sell Plaintiff gas under the terms of the contract in the absence of a novation or assumption of the contract by the assignee.

In the case at bar, Buffelen cannot repudiate the Corporation as transferee or assignee and at the same time, hold it liable for an alleged breach of the contract.

In any event, this is not an action for breach of contract and the Corporation cannot be held liable in tort if it did not induce or coerce a breach of the contract.

Appellee presents, under its Point III, its response to Appellant's Points IV, V, and VI, all of which relate to the allowance of the $118,000.00 damages for the alleged failure to supply logs for the operation of the Batterson Mill.

Appellee's Brief fails to demonstrate how this figure can be justified by the record.

This is not a case where a plant is shut down entirely during the period in question and estimates based on past experience, must be resorted to to establish loss of profits as in the *Bredemeier* case, 64 Or. 576, cited by Appellee.

The mill was in operation intermittently during the ten month period (January to October) for which loss of profits is claimed. Part of the time, the mill was shut down on account of "strikes", "fire weather" and "mill break downs." (Tr. 470-471). According to Appellee's own testimony, the mill had sufficient logs to operate on a one shift (contractual) basis (Tr. 469-470).

The month of December 1951 cannot be included contrary to Appellee's contention because the mill was operated by Gould during that month. Exhibit 22 (Tr. 480) shows that during October, November and December, the operation was by Gould. There is a bracket around these three months followed by the notation

"Operated by Gould. His figures not included."

Loss of profits are claimed for the period of time *subsequent to the commencement of this action,* which

is brought to repudiate the contract and the Corporation as a party thereto, and

"to declare a forfeiture of the contract". (Tr. 242).

The Corporation was not under obligation to supply logs to Gould while he was operating the mill and no claim is made for loss of profits during that period.

Exhibit 5 (Tr. 242), a letter from Buffelen to the Corporation, shows that the Corporation tendered Buffelen, prior to November 3rd, logs invoiced at $49,031.62 and $19,497.81, a total of $68,529.43; that Buffelen tendered payment for these logs but attached a condition. It is obvious, therefore, that the mill did not shut down for inability to obtain logs, but because Buffelen wanted the logs and at the same time to effect a "forfeiture of the contract." Buffelen could not refuse to take the logs tendered and then claim damages for loss of profits for failure to supply logs.

Since the mill was in operation and had enough logs to operate on a one shift basis, the loss of profits during that period must be attributed to causes other than lack of logs.

In any event, loss of profits cannot be determined by past experience in this case. The cause must be determined by the actual experience during the period in question. There is no occasion in this case for indulging in estimates.

The experience shown by Exhibit 21 demonstrates that there is no certainty of profits from the operation of the mill on a one shift basis.

Omitting the four months during which the mill was not in operation for various reasons, the Exhibit shows the following:

	Profit	*Loss*	
April		$7,890.96	1 Shift
June	$1,642.76		1 Shift
July		570.05	1 Shift
August	7,414.86		1 Shift
September	9,189.22		1 Shift
October		2,412.24	1 Shift

This exhibit demonstrates that profits do not inevitably result from a one shift operation. The monthly experience fluctuates from a high loss of $7,890.96 to a high profit of $9,189.22.

Exhibit 19 a-b-c (assuming it was admissible) does not support the estimate that the mill earned profits of $9,000.00 and $6,000.00 per month in the preceding two years for the following reasons:

(a) The summaries are based upon operation of the mill on two and three shift basis; whereas, the contract obligated the Logging Company to supply logs sufficient to keep the mill running on a one shift basis (Tr. 133-134-135).

(b) The profits shown in Exhibits 19 a-b-c, are *not actual profits.* They are *paper or bookkeeping profits.* 78% were interdepartmental transfers of the lumber by Buffelen Company to its various departments. These were not arms-length sales on the open market.

For example, Exhibit 19-b, which shows the operations for twelve months ending June 30, 1950, shows

the disposition of 18,105,662 feet of lumber in that year as follows:

Disposition of Lumber	Number of Feet	Alleged Sale Price	Average per M ft.
Transferred to:			
Hardwood-Tacoma	9,402	$ 1,504.32	$160.00
Door Factory-Tacoma	8,354,781	661,973.55	79.23
Sawmill-Tacoma	5,824,361	168,652.78	28.96
P. M. No. 3	66,738	6,673.80	100.00
Sold to *Others*	3,850,380	125,337.27	32.55
Sales Allowances		(1,312.45)	
	18,105,662		

21 plus % were alleged sales "to others". The sales "to others" were, in reality, the trading of lumber Buffelen could not use for "peelers" and "shop lumber" for use in its plywood and door plants.

The departmental transfers were at bookkeeping prices, averaging $79.23 per thousand board feet, while the sales (trades) "to others" were at $32.55 per thousand. These were not arms-length transactions.

Exhibit 19 a-b-c do not sustain a finding of estimated profits of $9,000.00 and $6,000.00 per month in the preceding years.

(c) Profits from the sale of lumber could not, under the facts in this case, constitute the measure of damages because such profits were *not within the contemplation of the parties*. The evidence of plaintiff's own officers and agents, establishes:

(1) That the Buffelen Company was not engaged in the purchase and re-sale of *logs* in the ordinary course of business for profit;

(2) It was not engaged in the business of manufacturing and selling *lumber* as such for profit;

(3) It was engaged in the *plywood business* and *door manufacturing business*. The object of the contract and the establishment of the Batterson Mill, was *to furnish a source of supply of lumber for use in its plywood and door manufacturing plants* and *not for the sale of lumber*. Its primary concern was to obtain "peelers" and "shop lumber", meaning a specific type of lumber cut to certain specifications suitable especially for door manufacturing purposes. *The lumber cut at the Batterson Mill was not manufactured to be, and was not, sold in the open market for the realization of profits from the sale* (Tr. 187 to 192 and 253 to 256).

If Plaintiff ever became entitled to recover for loss of profits, it would be loss of profits *in the operation* of its *plywood* and *door factories* and not profits from the sale of lumber in the open market.

It is not claimed in this case that profits were lost in the operation of the *plywood* and *door manufacturing plants* or that there were any sales lost by reason thereof.

It is settled law in Oregon, as it is everywhere beyond any question, that loss of profits is not a proper measure of damage in any event unless such loss was *in contemplation in connection with the subject matter of the sale*.

In the *Bredemeier* case, 64 Or. 576, cited by Appellee, the Court held:

> "The general rule is that, in order to recover profits in case of a breach of contract, such profits *must have been within the contemplation of the parties*

> at the time of the execution of the contract; and, where such profits do not enter into the contract itself, they will be denied. Anticipated damages, different from those which would ordinarily be sustained, are not always recoverable, but will only be awarded when, in view of special circumstances, they may be regarded as the natural and direct result of the breach, and are not problematical, but are capable of being foreseen and of being estimated with reasonable accuracy.
> "Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not suspectible of actual proof with any reasonable degree of certainty, no recovery can be had."

In *Martin v. Neer,* 126 Or. 345, a case relied on by Appellee, the Court said:

> "But, before a contemplated profit can be recovered the evidence must establish that it was reasonably certain to accrue. Uncertainty as to the amount is not fatal, *but an uncertainty as to whether any benefit or gain would be derived bars a claim for damages founded on alleged profits.*"

(d) In the case at bar, the evidence fails to support a finding that profits

> "was reasonably certain to accrue".

This is demonstrated by Exhibits 19 a-b-c, and Exhibit 22. For example, in the month of June 1951, the mill operated on a two shift basis. It cut 1,708,278 feet of logs and sustained a loss of $13,997.60 (Exhibit 19-C, first page), while in the preceding month of May 1951, it cut substantially the same amount of logs and made a book profit of $4,298.41. Now, the experience in these two months demonstrates clearly that there was no rea-

sonable certainty that profits would accrue from the operation of the mill, whether on a two shift or one shift basis. The same discrepancy is apparent in Exhibit 22, which covers the period for which the loss of profits is sought. During this period, the mill was operated on a one shift basis, yet we find, for example, that in April 1952, it sustained a loss of $7,890.96, while in June, it made a profit of $1,642.76. The uncertainty is manifested when the figures are read across the page. The amount of logs cut in the two months were substantially the same ($29,204 in April and $24,231 in June), yet, the "manufacturing expense" (separate from payroll and other expenses) was $8,994.00 in April and $2,694.00 in June. While they cut about $5,000 more logs in April, they sustained a loss of $7,890.96, and while they cut only $24,000 logs in June, they made a profit of $1,-642.00. How can it be said that there is any certainty of profit from the operation of the mill?

These illustrations can be multiplied many times by an examination of these exhibits.

In *Randles v. Nickum & Kelly Sand & Gravel Co.*, 169 Or. 284, the Court adopts the rule set forth in 15 Am. Jur., Damages, 574, Sec. 157, as follows:

> " 'The proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn' ".

In the very recent case of *Fireside Marshmallow Co. v. Frank Quinlan Const. Co.*, 213 F. 2d 16 (8th), the

plant was shut down completely for a period of time by reason of defendants breach of contract. The Court rejected Plaintiff's estimate of loss of profit of $1,000.00 per day because it was

"not based on any probative facts in the record"

and held that evidence that is "conjectural" and "speculative" could not form "a legal basis for determining" loss of profits.

The Court said:

"To warrant such a recovery (loss of profits) in other words, the proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of loss can be logically and rationally drawn."

loss of profits. The Court said:

"It is generally held that the expected profits of a commercial business are too remote, speculative and uncertain to permit a recovery of damages for their loss. To warrant such a recovery in other words, the proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of loss can be logically and rationally drawn."

. . . . .

"It is not to be inferred that recovery for loss of profits may not in a proper case be had. But to warrant such a recovery profits must be capable of being measured or ascertained on a reasonable basis. 'The sufficiency of the evidence of profits as an element of recoverable damages is dependent upon whether the data of which the evidence consist is

such that a just and reasonable estimate can be drawn from it, * * *.' Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 8 Cir., 194 F. 2d 846, 855."

IV.

Re: Appellee's Point IV.

Appellee attempts to sustain the decree insofar as it grants injunctive relief on the basis that the Corporation did acquire the equitable title to the timber lands, but did so subject to Buffelen's rights and that such rights can be protected by injunction.

The conclusion does not follow the premise because *the only surviving right,* if any, *was the option to buy logs,* (personalty) and as argued in the brief of Glasers (pp. 68 to 74), there is no equitable jurisdiction to grant any equitable remedies (specific performance or injunction) because

(a) an option is not an enforceable contract prior to the election to exercise it and lacks mutuality;

(b) an option to buy logs (personal property) creates no interest in real property;

(c) there is nothing unique about an option to buy logs which will invoke equitable jurisdiction.

Appellee now urges it did exercise the option; that it thereby converted the option into a binding contract to purchase and supplied the essential element of mutuality.

There is *no finding of fact* that it exercised the option and converted it into an absolute contract to purchase all the logs until the timber was exhausted.

Even if this were true, it would still be only a contract for the purchase of personal property not enforceable in equity.

It is not true that the option was exercised at the time the action was commenced or even thereafter. Buffelen did, from time to time, elect to buy some of the logs produced by the Logging Company (about 50%). It did not buy any peelers at all for the Tacoma Plant. But Buffelen never did elect to take "all" of the logs (saw logs and peelers) that would be produced by the Loggers in the future from the timber lands described in the contract until all of the timber was exhausted. This option could only be converted into a binding contract to buy "all" of the logs cut from the timber lands here involved until all of the timber was exhausted, and this it could only do by an unequivocal election to do so, so that at any time thereafter, upon Buffelen's refusal to accept any logs of any kind and of any grade, the Logging Company would have a cause of action for breach of contract. Buffelen never did make such an election at any time. It carefully avoided placing itself in that position. In the May 1951 conversation, Holm merely

> "advised either Mr. McKenney or Mr. Glaser that Buffelen wished to purchase *all saw logs* from the Tillamook operation".

He did not say that they would buy the *peelers* and they did not buy *the peelers* (Tr. 180-181). He did not say that they would take all the logs *in the future*. Holm testified that they didn't buy peelers after May because

> "it wasn't a type of logs that we wanted for our plant at Tacoma". (Tr. 188).

He didn't want to buy any peeler logs in May, June, July, and August

> "because they wasn't logging in suitable timber at that time. And we had a man on the operation to notify us of the type of logs were going in." (Tr. 188-189).

Obviously, if the option had been converted into a contract, Buffelen would have been compelled to take all the logs and not select what they would take and what they would leave.

In August, 25th or 26th, Bradeen was instructed to tell Glaser that they wanted raft 44 M

> "And all other peeler rafts *until further notice.*" (Tr. 196).

The instruction that they would take peeler logs *"until further notice,"* is inconsistent with an absolute contractual obligation to purchase all of the logs. Buffelen reserved the right to determine what logs it would take and when. This is not a binding contract of purchase.

Buffelen made no *written* election to exercise the option to purchase all logs until the timber was exhausted at any time or any written election at all. The first written communication demanding logs was the letter of November 3rd (Tr. 242) and the letters of November 23rd and December 24th (Tr. 243-244) while this action was pending. These three letters do not constitute an unequivocal election to take "all" logs until the timber is exhausted. The letters are carefully phrased to avoid

such construction. The letters were written by Mr. Dezendorf, the able Counsel for Buffelen. He knew how to word an unequivocal election to exercise an option. The phrase

> "This is official confirmation of Buffelen's *continued desire to avail itself of the option* to purchase all logs . . ."

especially when read in conjunction with the letter of December 24th (Tr. 244), demonstrates that they did not intend these letters to be an unequivocal election. It is merely *an expression of the desire to keep the option alive* and not to convert the option into a contract. In the letter of December 24th, Buffelen asserts that they refuse to accept Raft 64 M because they had no opportunity to inspect the raft. It said that they

> "cannot decide whether to purchase a log raft without an opportunity to inspect."

It is obvious that Buffelen wanted to remain on a selective basis to determine when and what logs they would purchase.

The case of Southwest Pipe Line Co. v. Empire Natural Gas Co., 33 F. 2d 248, cited by Appellee, has not the slightest resemblance to the case at bar. In that case, the parties *had a binding contract and not an option.* The contract was for the purchase and sale of natural gas to be taken by the purchaser on the land at the well head, coupled with an easement to the purchaser to go on the land and make extensive installations thereon with the well for the receipt and transmission of gas and storage thereof. The Court held that the contract "grants a present interest in the land" which

equity can protect by injunction. It was pointed out that the contract was not merely for the sale of gas after it was severed from the land. The purchaser was to take the gas from the land at the well and this, coupled with the easements, created the interest in realty. It would be analogous to a contract for the sale of standing timber. It has no analogy to a contract or option for the purchase of logs *after they are severed,* which is personalty. The Court also held in that case that

> "natural gas is not obtainable in the general market as is wheat, corn, flour and livestock."

This is not true of logs which can be purchased on the open market.

The equitable principle that

> "A party taking with notice of an equity, takes subject to that equity"

was used with respect to notice of an interest in realty, which will be protected in equity, but has no application to notice of an option to purchase personalty.

Appellee attempts to avoid consideration of the question whether the Court had equity jurisdiction to make the decree by asserting that the question was waived. It is our understanding that the question of whether the Court of Equity has jurisdiction, is never waived. If the case, as made out, presents no cause of equitable cognizance, the Court was without jurisdiction to issue any injunction.

CONCLUSION

For the reasons assigned in the Opening Brief and in this Reply Brief, the decree and the judgment entered herein, should be reversed and the complaint dismissed.

Respectfully submitted,

S. J. BISCHOFF,
LEO LEVENSON,

Attorneys for Appellant,
McKenney Logging Corporation.